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In The

Supreme Court Of The United States

October Term, 1992

IN THE MATTER OF THE GRANDPARENTAL VISITATION OF C.G.F.:
T.F. AND D.L.,

Petitioners,

v.

H.F. and F.F.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

A state, in granting parental powers to an adoptive parent, may retain the right to order grandparent visitation over the objection of that parent if the visitation is in the best interest of the child. Finding that such a reservation of authority violates a fundamental due process right of the adoptive parent would unduly created a new fundamental constitutional right in an area of family law. Domestic relations law is an area that should best be left to the states.

The petitioner has simply failed to allege any constitutional basis sufficient to compel this Court to overturn the grandparent visitation statutes that exist in all fifty states.

The Wisconsin Legislature has a sufficient basis to differentiate between the rights of parents who adopt after a judicial termination of parental rights and the rights of parents who adopt after the death of a natural parent.

ARGUMENT

I. A STATE HAS THE RIGHT TO ORDER GRANDPARENT VISITATION OVER THE OBJECTION OF A NATURAL PARENT AND ADOPTIVE PARENT IF THE VISITATION IS IN THE BEST INTEREST OF THE CHILD.

This case involves the issue of whether a state can order grandparent visitation over the objections of a natural mother and her husband, who had adopted the grandchild. It is not a case testing the limits of the power of married parents to determine who may visit their natural children. Petitioner seeks to characterize it as such, however. The petitioner repeatedly argues that marriage creates certain rights. The petitioner gives citations for this proposition. However, the

cited cases all involve the legal rights of parents to the natural offspring of the marriage. An examination of a state's ability to interfere in such a family relationship is not applicable to the fact situation at hand.

The marriage of the petitioners created no legal rights to the child for the new stepfather. As a stepparent, the husband of the child's natural mother, he had no right to challenge visitation by any party. However, the petitioner claims that "the second marriage of the wife to the adoptive father insures the same fundamental freedoms as any marriage." Brief, page 5. This is incorrect. The marriage creates many rights, including many of the family rights spoken of in petitioner's brief. However, the marriage creates those rights only as to the family unit created by the marriage, which consists of the husband, wife, and the natural offspring that they may jointly create. The mere marriage creates no rights of the husband to the wife's already existing natural child.

Adoption, not marriage, is the process that creates rights to the child for the stepfather. However, adoption is strictly a creature of statute. It did not exist at common law. Estate of Topel, 145 N.W.2d 162, 32 Wis. 2d 223 (1966). Only by virtue of the rights granted by the state can the stepfather adopt the child. Only by adopting the child can the stepfather exercise legal control over the child and seek to control who may visit the child. If only the state can grant the adoptive parent control over the child, it is clear that the state can set limits on the amount of control to be exercised. In this case, the state retained the ability to allow natural grandparents to visit the child over the objections of the adoptive father provided that a court found that such visitation was in the best interest of the child. There is nothing in the reservation of such a right unto the state which violates the adoptive parents' constitutional rights.

The petitioners say that the grant of grandparent visitation violates the fundamental due process rights of the parents. The petitioners are seeking to expand the list of fundamental constitutional rights to include the right of an adoptive parent to decide that grandparents cannot visit their natural grandchild even if such visitation is found by a court to be in the child's best interest. This Court held in Bowers v. Hardwick, 478 U.S. 186, 195, 92 L.Ed.2d 140, 148, 106 S.Ct. 2841, (1986), that "There should be, therefore, great resistance to expand the substantive reach of those clauses, particularly if it requires redefining the category of rights deemed to be fundamental". Just such an extension is argued by the petitioner and, as in Bowers, just such an extension should be rejected by this Court.

The issue of a state's right to allow grandparent visitation with the natural grandchild over the wishes of an adoptive father and a natural mother is a family law issue. Ordinarily, state law, not federal law, should determine issues of domestic relations. In re Burrus, 136 U.S. 586, 593-4 (1980), Ankenbrandt v. Richards, 19 L.Ed.2d 441 (1992).

The Wisconsin Supreme Court found that the Legislature acted within its province in deciding that grandparents had a right to seek visitation, if, and only if, it were in the child's best interest. Wisconsin has decided that the best interest of the child may include consideration of the grandparent-child relationship, a relationship honored in all societies, but here reinforced by statute.

II. WHILE STATES DIFFER IN THE SCOPE AND CIRCUMSTANCES OF GRANDPARENT VISITATION, ALL FIFTY STATES HAVE ESTABLISHED JUDICIAL ABILITY TO ORDER VISITATION UNDER CERTAIN CIRCUMSTANCES.

The petitioner provides citations indicating that all fifty states have established statutes allowing grandparent visitation over the objection of parents. The petitioner seeks to have all of these statutes declared unconstitutional yet fails to allege a sufficient, adequate constitutional basis to compel such drastic federal intervention.

III. THE STATE HAS A COMPELLING GOVERNMENT INTEREST IN EFFECTUATING THE BEST INTEREST OF A CHILD AND MAY CREATE DISTINCTIONS BETWEEN THE RIGHTS AFFORDED TO AN ADOPTIVE PARENT OF A CHILD WHOSE NATURAL FATHER HAS DIED AND THE RIGHTS OF AN ADOPTIVE PARENT OF A CHILD WHOSE NATURAL FATHER'S PARENTAL RIGHTS WERE TERMINATED BY JUDICIAL PROCEEDINGS IF THE CREATION OF SUCH A DISTINCTION FOSTERS THE BEST INTEREST OF THE CHILD.

In the opinion below, the Wisconsin Supreme Court carefully analyzed the Wisconsin Legislature's intent relative to the respective authority of parents who adopt after judicial termination of a natural parent's rights and those who adopt after the death of a natural parent. Supp. App., pages 4-8. The Court found a legislative intent to permanently and completely sever ties between a child and the natural parent if the natural parent's rights had been terminated by judicial decree. No such intent to permanently sever the relationship between the child and the birth parent or the birth parent's family was found in the instance of the death of the natural parent.

The policy reasons for the disparity in legislative intent are obvious. Parental rights are only terminated by judicial decree if it is found that the continuance of the

relationship between the parent and the child is harmful. By definition, if a child is adopted after a termination of parental rights, a court has already decreed that it is in the best interest of the child to permanently sever the relationship with the parent. In a death case, no such finding has been made. Rather, prior to the natural parent's death, a presumptively beneficial relationship existed between the parent and the child. The death of the parent should not sever the court's authority to perpetuate a beneficial relationship between the child and the dead parent's family.

CONCLUSION

For the reasons and authorities cited, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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